United States Court of Appeals

EIGHTH CIRCUIT

No. 14,212

IN BANKRUPTCY.

UNITED STATES, APPELLANT,

vs.

GENERAL ENGINEERING AND MANUFACTURING COMPANY, A CORPORATION, DEBTOR, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

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[fol. 2] (Amended Claim of United States for Taxes.)

(Filed April 7, 1950.)

Amended

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri

In the Matter of—

General Engineering & Manufacturing Co.
4417 Oleatha Avenue
St. Louis, Missouri

Index or Docket No. 11319

In Arrangements*Chapter XI of the Bankruptcy Act

City of St. Louis,
State of Missouri.—ss.:

Arthur J. Brady, Deputy Collector in Chg. of Internal Revenue for the First Collection District of Missouri, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

1. That General Engineering & Manufacturing Co. above-named is justly and truly indebted to the United States in the sum of $25,156.27 with interest thereon as hereinafter stated.

2. That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Nature of Tax Statute involved	Year or Taxable Period ended		Amount of Tax	With interest at the rate of 6% per annum until dat
Fica	9/30/48	Tax	$ 4,492.86	Plus Stat. Int. from 11/17/48 to
		Int	11.82	" " " " " "
Fica	10/1/48 to 11/16/48	Tax	1,111.67	" " " " " "
Futa	1/1/48 to 11/16/48	Tax	** 6,444.80	" " " " " "
Withholding	9/30/48	Tax	5,956.22	" " " " " "
		Int	15.66	" " " " " "
Withholding	10/1/48 to 11/16/48	Tax	7,123.24	" " " " " "
			$25,156.27	

**If claim of Division of Employment Security, State of Missouri, is paid in full, Collector's claim will be reduced in accordance with Section 1601(a)(3) of the Internal Revenue Code.

(Interest claimed herein has been figured up to and including 11/16/48).

3. That no part of said debt has been paid, but that the same is now due and payable at the office of the Collector of Internal Revenue at St. Louis, Missouri.

4. That there are no set-offs or counterclaims to said debt.

5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens.

6. That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7. That said indebtedness has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 of Public Law 171, July 1, 1898, 55th Congress as amended and Section 659 of Public Law 696, 75th Congress; that the provisions of Section 3466 of the Revised Statutes of the United States must be observed where applicable; that attention is also called to the provisions of Section 3467 of the Revised Statutes of the United States, with respect to the personal liability of every executor, administrator, assignee or other

person who fails to pay the claims of the United States in accordance with their priority.

Dated this 7th day of April 1950

ARTHUR J. BRADY
Deputy Collector in Charge for
the First District of Missouri

Subscribed and sworn to before me this 7th day of April, 1950.

MARGARET M. BOREN
Notary Public

My Commission Expires Feb. 19th, 1951

[fol. 3] Petition for Hearing on Claims of the United States of America and the State of Missouri Based Upon Social Security Taxes Owed by Debtor as of the Date of Commencement of These Proceedings and for Determination of the Respective Amounts Due.

(Filed Dec. 16, 1949)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In the Matter of

General Engineering and Manufacturing Company,
a corporation, Debtor.

In Proceedings for an Arrangement under Chapter XI.

Division No. 2. No. 11,319

General Engineering and Manufacturing Company, Debtor herein, states as follows:

1. As of the date of the commencement of these proceedings, November 17, 1948, Debtor owed to the United States of America certain sums on account of social security taxes and withholding taxes. In this connection, the amounts claimed by the United States of America, ex-

clusive of interest, are set forth below and are presently outstanding and unpaid.

Social Security Taxes

Federal Insurance Contribution 9-30-48	$ 4,526.38
5% penalty	226.32
Federal Insurance Contribution 10-1-48 to 11-16-48	1,111.67
Federal Unemployment Tax	6,473.45
Withholding Taxes 9-30-48	5,956.22
Period 10-1-48 to 11-16-48	7,123.24
Total	$25,417.28

[fol. 4] In addition to the amounts shown above, the United States of America is asserting a claim for interest thereon to date of payment.

2. The claim of the United States of America for the payment of said social security taxes and withholding taxes has priority under Section 64(a)(4) of the Bankruptcy Act and is to be paid out of the funds heretofore deposited by the Debtor for the payment of prior claims. However, Debtor has refused to pay, or recommend payment of, the aforesaid claim for the following reasons:

(a) Said claim includes accrued interest after the date of the commencement of these proceedings. Debtor believes this to be contrary to law. New York vs. Saper, 336 U. S. 328; 93 L. Ed. 571; 69 S. Ct. 554.

(b) A 5% penalty, amounting to $226.32, has been assessed in connection with return filed by the Debtor for federal insurance contributions for the quarter ending September 30, 1948. This penalty was apparently assessed because of late filing of the return. This assessment of $226.32 appears clearly to be a penalty or forfeiture prohibited by Section 57(J) of the Bankruptcy Act.

(c) The amount of $6,473.45 shown above as federal unemployment taxes due for the period January 1, 1948 to and including November 16, 1948, does not give effect to

the credit to which Debtor will be entitled under the statute, 26 USC 1601, as and when it pays to the State of Missouri the unpaid balance due the State for unemployment taxes assessed during the period involved. In this connection said Section 1601(a)(3) provides that any employer, upon timely payment to the state of the state's share of unemployment taxes, is entitled to a credit of the amount so paid against the unemployment taxes required to be paid by such employer to the United States of America. [fol. 5] In the event payment to the state is not made on time, then the credit to which such employer is entitled is reduced to 90% of the credit otherwise allowable. In the instant case, Debtor has deposited with this Court sufficient funds to pay the unpaid balance of the unemployment taxes claimed by the State of Missouri ($4,043.91) and such payment will be made when ordered by this Court. However, the representatives of the United States of America have stated that they will nevertheless refuse to give the credit provided by law when payment is made to the United States. Debtor cannot safely, therefore, pay either the United States of America or the State of Missouri until it is determined whether or not the above mentioned credit is allowable. In this connection, it may be stated that the question involved is not whether the disallowance of such credit would constitute a penalty or forfeiture prohibited by Section 57(J) of the Bankruptcy Act but rather whether Debtor is entitled to the credit provided for all taxpayers by said Section 1601(a)(3).

3. The State of Missouri has a claim against Debtor for unpaid unemployment taxes in the amount of $4,043.91 for the quarter ending September 30, 1948. Interest on this amount is claimed at the rate of ½% per month from due date to the date of payment. Debtor has not paid this claim for the following reasons:

(a) Because of the existing uncertainty as to whether credit for such payment will be allowed in connection with the payment of unemployment taxes required to be paid to the United States of America, Debtor is of the belief that such payment should be withheld until the questions mentioned above have been resolved.

(b) It is the belief of the Debtor that the assessment of interest for the period subsequent to November 17, 1948, [fol. 6] when these proceedings were instituted, is contrary to law. New York vs. Saper, 336 U. S. 328; 93 L. Ed. 571; 69 S. Ct. 554.

Wherefore, Debtor prays that the above and foregoing claims of the United States of America and of the State of Missouri be set down for hearing in order that the respective amounts of said claims may be determined.

Dated this 16th day of December, 1949.

JAMES S. McCLELLAN
Attorney for Debtor.

Of Counsel:

Willson, Cunningham & McClellan,
1930 Boatmen's Bank Building,
St. Louis 2, Missouri.

[fol. 7] (Order of Referee in Bankruptcy setting Claims of United States of America and State of Missouri for Hearing, etc.)

(Filed December 16, 1949.)

At St. Louis, in said District, this 16th day of December, 1949.

The petition of Debtor for determination of the amounts due on the claims of the United States of America and the State of Missouri having been filed herein and duly considered, and good cause having been shown, and it appearing that no notice of the filing of said petition and the entry of this Order has been given and that none is required, it is therefore

Ordered, that hearing on said claims of the United States of America and of the State of Missouri for the purpose of determining the respective amounts thereof be set down for hearing before the undersigned Referee in Bankruptcy on January 4, 1950, at 11:00 o'clock A. M.; and it is further

Ordered, that Debtor shall give notice of said hearing by forthwith mailing or delivering a copy of this Order and a copy of said petition to the United States Attorney

for the Eastern District of Missouri and to the Division of Employment Security, Department of Labor and Industrial Relations, Jefferson City, Missouri.

WM. O'HERIN,
Referee in Bankruptcy.

[fol. 8] (Order of Referee in Bankruptcy that Amended Claim of United States of America be allowed as a Priority Claim, etc.)

(Filed May 9, 1950.)

At Saint Louis, in said Division of said District, this 9th day of May, 1950.

On December 16, 1949 General Engineering and Manufacturing Company filed its petition for a hearing and determination of the amended claim (No. 23) of the United States of America for taxes, filed February 23, 1949, in the amount of $30,412.23. On January 4, 1950, pursuant to notice, hearing was had on said claim and the matter taken as submitted. After submission of the matter, and on April 7, 1950, by agreement of the parties, a second amended claim was filed by the United States (No. 571) in the amount of $25,156.27, plus interest at six per cent per annum from November 17, 1948 to date of payment:

And the Referee having duly considered said second amended claim, the briefs filed by the parties, and being now fully advised in the premises, it is, in accordance with the memorandum hereto attached—

Ordered that the second amended claim of the United States of America (No. 571), be and hereby is allowed as a priority claim for taxes under Section 64a (4) of the Bankruptcy Act, in the amount of $25,156.27, without further interest, and less credit due under Section 1603 (a) (3) of the Internal Revenue Code for unemployment contributions paid the Division of Employment Security, State of Missouri.

WM. O'HERIN,
Referee in Bankruptcy.

[fol. 9] Memorandum.

Statement.

The United States, on February 23, 1949, filed an amended claim (No. 23) herein for social security and withholding taxes, allowance of which was postponed. On December 16, 1949, debtor filed a petition for a hearing and determination of said claim, which in effect constituted objections to said claim. A hearing was held January 4, 1950 and the matter submitted upon briefs to be thereafter filed by the parties. Consideration of the claim disclosed that it included taxes which had accrued subsequent to the filing of debtor's petition for an arrangement, which in the interim had been paid, and in addition a recomputation of interest was necessary. By agreement of the parties a second amended claim was filed by the government April 7, 1950 (Claim No. 571), which is the claim presently for determination. This claim is for social security taxes and withholding taxes which accrued prior to November 17, 1948, the date of the filing of debtor's petition, which taxes with accrued interest tc November 16, 1948, aggregate $25,156.27. In addition interest is claimed from November 17, 1948 to date of payment. The claim states that unemployment taxes accruing from January 1, 1948 to November 16, 1948, aggregating $6,444.80, will be reduced in accordance with Section 1603 (a) (3) of the Internal Revenue Code if the claim of Division of Employment Security, State of Missouri, is paid in full.

[fol. 10] The objections of the debtor to the first amended claim (No. 23) were (1) that the government was not entitled to interest on this tax claim after the date of commencement of these proceedings; (2) that the claim included a penalty, not allowable; and (3) that the claim did not recognize or give effect to debtor's right of credit under Section 1603 (a) (2) of the Internal Revenue Code. The filing of the second amended claim has eliminated debtor's objections (2) and (3), so that the sole question for decision is whether or not the United States is entitled to interest on this tax claim from the date of filing of the petition herein, November 17, 1948, to date of payment of the tax.

The debtor insists that such interest is not allowable under New York vs. Saper, 336 U. S. 328, 69 S. Ct. 554 (Decided March 7, 1949 denying post-bankruptcy interest on tax claims). The government insists that the Saper case is not controlling here for the reason that it involved straight bankruptcy under Chapters I to VII of the Act, while the instant case is one for an arrangement under Chapter XI of the Act.

The undisputed material facts are as follows:

Debtor's petition for an arrangement was filed November 17, 1948. Debtor was originally and for many years had been engaged in the manufacture of shapers (machine tools), but in recent years began the manufacture of commercial air conditioning equipment, which at the time of commencement of these proceedings was its chief business, the manufacture of shapers having been relegated to a secondary position. The plan proposed in the original petition was in the nature of an extension. However, the company's financial condition and lack of a line of products sufficient to sustain operations in the off season made continued operation of its air conditioning business impracticable, and the proposed plan was abandoned. It was apparent that the best interests of the creditors would be served if the air conditioning division of the business could be sold as a going concern rather than have an immediate liquidation of the company. In order to maintain [fol. 11] the business, together with its distributorship system, for such sales purpose, operations were continued under Court order, during which time material inventories were processed into finished units, those remaining unsold being included in the subsequent sale of the business. A purchaser was obtained after several months of negotiations and the plan formulated which was subsequently approved by creditors and confirmed by the Court. Under this plan debtors' air conditioning division was sold to Automatic Firing Corporation, a manufacturer of heating equipment. This sale in addition to the air conditioning division included all debtor's real estate and buildings, but excluded its machinery and equipment for manufacture of shapers, which together with all other assets, including the proceeds of the sale to Automatic Firing Corporation, were transferred to a liquidating corporation, with the

exception of shaper inventory not to exceed in value $135,000.00, and shaper patents, drawings, jigs, etc., which were retained by debtor. Debtor has no remaining facilities left for manufacture of shapers, but contracts with other tool manufacturing companies to so do under its patents and in the process using up the shaper inventory so retained. The stock of this liquidating corporation is held by a creditors' committee of four selected by the creditors and the assets transferred to it, are upon liquidation to be distributed upon a proportionate basis to the general unsecured creditors. This method was adopted, as part of the purchase price received from Automatic was in notes payable within four years and liquidation of certain inventories over a period of time involved. From the proceeds of sale of the real estate there was deposited in Court $204,000.00 for payment in full of claims for $100.00 each or less, as provided in the plan, and payment of priority claims. The deposit is for more than the amount required. Any balance remaining is to be paid to the liquidating corporation for the benefit of general creditors. No objections to this plan were filed at any time prior to its confirmation. Having been accepted by the required creditors affected it was, upon due notice to [fol. 12] all parties in interest, confirmed September 13, 1949.

Opinion.

In City of New York vs. Saper, 336 U. S. 328, 69 S. Ct. 554, the Supreme Court affirmed decisions of the Court of Appeals for the Second Court, denying interest after the filing of a petition in bankruptcy on sales tax imposed by the City of New York (Saper vs. City of New York, 168 F. (2d) 268), and tax claims by the United States and State of New York (Carter vs. United States, 168 F. (2d) 272).

The Supreme Court there points out that the rule stopping interest at bankruptcy had been established as a fundamental principle of the English bankruptcy system for almost two hundred years and our bankruptcy law was copied from it. That our law contains no provision expressly repudiating that principle or allowing any exception in favor of tax claims. That the logical implications from relevant provisions of the present law are to the

contrary, citing Section 63 of the Act, subdivisions a (1) and a (5) (11 U.S.C.A. a (1), (5)) allowing interest on judgments and written instruments only to date of bankruptcy, and only to that rate on debts reduced to judgment after bankruptcy. That no provision of the Act permits post-bankruptcy interest on other claims in general or tax claims in particular. That Section 57n (11 U.S.C.A., Sec. 93n) requires governmental claims be proved in the same manner and within the same time as other debts and that tax claims are treated the same as other debts except for the fourth priority under Section 64a.

The court notes that the practice of allowing interest on tax claims in bankruptcy to time of payment dates back to In re Kallak, 147 F. 276 (D.C. N. Dak. 1906) and cases following it, and then states that it was there first decided that Section 64 of the Act of 1898 gave taxes absolute priority over claims of every kind as subsection (a) provided that the court "shall order" the trustee to pay taxes in advance of the payment of dividends to creditors, and subsection (b) following, set up the order of priorities (1. Costs of preserving the estate; 2. filing fees; 3. ad-[fol. 13] ministration expenses; 4. wages); that taxes were not claims in bankruptcy, as they need not be proved but the trustee was obligated to seek them out and pay them in full and the court saw no reason why the rule stopping interest on ordinary claims, which was a rule of expediency and convenience, should apply to taxes.

After thus reviewing the Kallak case, the Supreme Court states that Section 64a has since been amended, first in 1926 and later by the Chandler Act, so as to deprive taxes of their preferred status. The 1926 amendment (Sec. 15 of the Act of May 27, 1926, c. 406, 44 Stat. 662, 666) expressly provided that taxes yield priority to administration expenses and wages, neither of which bear interest. That the Chandler Act amendments "finalized the subordination of taxes to other priority items" and also wrote into Section 57n the requirement of proof, formerly unnecessary on tax claims under Section 64a. The ultimate conclusion is stated as follows, 69 S. Ct., l. c. 559:

"The Court of Appeals concluded that by the 1926 amendment and the Chandler Act, Congress assimilated

taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to Sec. 64, sub. a, and 57, sub. n. Considered in conjunction with the general rules against post-bankruptcy interest as well as Sec. 63's limitations of interest on other claims to date of bankruptcy, they compel our conclusion, already stated, that the statute as amended did not contemplate any exception in favor of tax claims."

As hereinbefore noted the government contends that this decision of the Supreme Court is not controlling, its application being limited to straight bankruptcy. This contention cannot be sustained.

An arrangement may be by way of settlement or satisfaction or by extension. It is to be noted at the outset that the arrangement in this case is not by way of extension. Payment is to be made to general unsecured creditors upon a proportionate basis, out of the proceeds derived from liquidation of the assets which under the plan go to creditors.

Section 302 of the Act provides that the provisions of [fol. 14] Chapters I to VII shall apply to proceedings under Chapter XI except where inconsistent or in conflict with the provisions of the latter Chapter.

In a case such as this, filed under Section 322 (an original petition where no bankruptcy is pending), Section 352 makes the rights, duties and liabilities of creditors and others, with respect to debtor's property, the same during the Chapter XI administration as they would have been if the debtor had filed a voluntary petition in straight bankruptcy and an order of adjudication entered when the petition was filed. In re Morgan, 15 F. Sup. 52 (D.C. N.Y.); Collier (14th Ed.) Vol. 8, p. 941.

The only definition of "creditors", "debts" or "claims" in Chapter XI are those contained in Section 307, which is defining them states in each instance "whether or not provable as debts under Section 63 of this Act." That section by its express terms is limited to "an arrangement providing for an extension of time for payment of debts in full." It is not applicable in this case, which as above noted is not an extension arrangement.

There is no comprehensive definition of "creditor" where the arrangement is by way of settlement or satisfaction. Collier (14th Ed.) Vol. 8, p. 946 states:

"Hence, under the applicability provisions of Sections 302 and 352 of Chapter XI, the definition of 'creditor' and the correlated definition of 'debt' in Sec. 1 (11), (14) of Chapter I apply for all purposes. Section 1 (11) states that 'creditor shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy,' while Sec. 1 (14) defines 'debt' to 'include any debt, demand, or claim provable in bankruptcy.' Debts provable in bankruptcy are enumerated in Sec. 63. A person who owns a debt provable under Sec. 63 is therefore a 'creditor' in an ordinary bankruptcy proceeding under Chapters I to VII of the Act. By virtue of Sections 302 and 352, a person who owns a debt provable under Sec. 63 is likewise a creditor in an arrangement proceeding under Chapter XI, where the arrangement is by way of settlement or satisfaction."

See also In re Strotz, 50 F. Sup. 322, 324 (D. C. Cal.).

The provisions of Section 63a, referred to in the Saper case, limiting interest to date of bankruptcy, are applicable to the present proceeding (a Section 322 case by way of settlement or satisfaction). Collier (14th Ed.) par. 7.05, pp. 947, 948.

[fol. 15] The government in its brief correctly states that Section 64 of the Act establishing priorities is applicable here to determine which are priority claims under Section 337 (2) (deposit for payment of priority debts). It is by reason of the statutory command of Section 64a (4) that this tax claim of the United States (for taxes and interest accrued to bankruptcy) is a priority claim. And it was by virtue of Section 64a (5) (debts owing the United States) that the government's claim for refund of excess profits was heretofore allowed priority in this case and not by reason of recognition or approval of "the absolute priority rule" as stated in the government's brief. Such rule (whether or not requiring payment of post-bankruptcy interest) has no place here and will not apply. Of course, that not being a tax claim, the government did not claim post-bankruptcy interest.

The argument is made by the government that the Internal Revenue Code compels allowance of this interest irrespective of the Bankruptcy Act. This same argument was rejected by the court in the Saper decision.

To the extent that priority claims and interest on this tax claim (if such were allowable) are paid then to that extent is the fund distributable to general creditors depleted. Under the long established general rule against post-bankruptcy interest (69 S. C. 555 note 7) and the provisions of Section 63 of the Act applicable here, these creditors may not include post-bankruptcy interest in computing the amount of their claim, upon which proportionate distribution is based nor is such payable on priority claims other than taxes.

The conclusion of the Supreme Court in the Saper case that taxes are assimilated to other debts for all purposes, including denial of post-bankruptcy interest, is applicable under the facts here. This tax claim of the United States will be allowed for taxes and accrued interest to and including November 16, 1948. Interest thereon from and after November 17, 1948, the date of filing of debtor's original petition herein will be denied. An order will enter accordingly.

WM. O'HERIN,
Referee in Bankruptcy.

St. Louis, Missouri,

May 9, 1950.

[fol. 16] (Petition of United States of America for Review of Order of Referee in Bankruptcy.)

(Filed May 19, 1950.)

The United States of America, claimant herein, by Drake Watson, United States Attorney for the Eastern District of Missouri, and Wm. V. O'Donnell, Assistant United States Attorney for said District, respectfully states as follows:

1. Claimant, United States of America, is aggrieved by the Order herein of Honorable Wm. O'Herin, Referee in Bankruptcy, dated May 9, 1950, a copy of which order is

annexed hereto, marked "Exhibit A", and made a part hereof.

2. The Referee erred with respect to said Order in disallowing interest on $25,156.27 earned subsequent to November 16, 1948, the date when petition was filed herein.

Wherefore claimant prays that said order be reviewed by the United States District Court in accordance with the provision of the Act of Congress relating to bankruptcy, that the said order be reversed, and that this claim of the United States for interest subsequent to the commencement of these proceedings be allowed.

DRAKE WATSON,
United States Attorney.

WM. V. O'DONNELL,
Assistant United States Attorney.

Dated this 18th day of May, 1950.

[fol. 17] Certificate Of Referee On Petition Of United States Of America For Review Of Referee's Order Of May 9, 1950 Denying Post-Bankruptcy Interest On Tax Claim Of United States (No. 571).

(Filed May 25, 1950.)

To the Honorable Judges of said Court:

I, Wm. O'Herin, Referee of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in the above cause before me, the following question arose pertinent thereto:

On November 17, 1948, General Engineering and Manufacturing Company filed a petition for an arrangement under Chapter XI of the Bankruptcy Act.

On February 23, 1949 the United States of America filed its amended claim for social security, withholding and unemployment taxes (No. 23) in the amount of $30,412.23. On December 16, 1949, the debtor filed a petition for hearing and determination of said claim. The claim was set for

hearing on January 4, 1950, pursuant to notice, and the matter was heard and submitted on that date.

After submission of the matter, and on April 7, 1950, by agreement of the parties, a second amended claim was filed by the United States (No. 571) for social security, withholding and unemployment taxes accrued prior to November 17, 1948, the date of the filing of the Chapter XI proceeding, which taxes, with accrued interest to November [fol. 18] 16, 1948, aggregate $25,156.27. In addition interest is claimed from November 17, 1948 to date of payment. (Claim No. 571 and the debtor's petition for hearing and determination of said claim are transmitted herewith).

Evidence.

No evidence was offered. The findings made are based on the record in the case and stipulated by the parties to be true and correct. (The stipulation filed is transmitted herewith).

Order of Referee.

On May 9, 1950, the Referee entered an order allowing Claim No. 571 of the United States for taxes and interest accrued prior to November 16, 1948, in the amount of $25,156.27, less credit due under Section 1603(a) (3) of the Internal Revenue Code for unemployment contributions paid the Division of Employment Security, State of Missouri. Interest subsequent to November 17, 1948 was denied. (The Referee's order and the memorandum filed therewith are transmitted with this certificate).

Petition for Review.

On May 19, 1950, and in due time, the United States of America filed a petition for review of the Referee's order of May 9, 1950, and the said petition is transmitted herewith.

Question for Determination.

The question for determination is the correctness of the Referee's order of May 9, 1950, denying post-bankruptcy

interest on the tax claim of the United States; and the matter is submitted to the Judge for his opinion.

Respectfully submitted,

WM. O. HERIN,
Referee in Bankruptcy.

St. Louis, Mo.

May 26, 1950.

[fol. 19] The following papers are transmitted with this Certificate:

1. Claim No. 571 of the United States of America.
2. Petition of Debtor for hearing and determination of said claim.
3. Original order of Referee of May 9, 1950, and memorandum filed therewith.
4. Stipulation between Debtor and United States that facts stated in Referee's memorandum are correct.
5. Petition of United States for review of Order of Referee of May 9, 1950.

[fol. 20] (Stipulation that All Facts Stated in Memorandum Written by Referee in Bankruptcy and made the Basis of his Order of May 9, 1950, refusing the Claim of the United States of Interest, etc., be considered to be True and Correct.

(Filed May 19, 1950.)

It is hereby stipulated and agreed by and between General Engineering and Manufacturing Company, debtor herein, and the United States of America, by Drake Watson, United States Attorney for the Eastern Judicial District of Missouri, and Wm. V. O'Donnell, Assistant United States Attorney for said District, acting for and on behalf of the United States of America, that all of the facts stated in the memorandum written by the Honorable Wm. O'Herin, Referee in Bankruptcy, and made the basis of his Order, entered May 9, 1950, refusing the claim of the United States for interest on claim for taxes earned subsequent to the commencement of these proceedings, a copy of which

said Order is attached to claimant's Petition for Review, be considered to be true and correct. Copy of said memorandum and copy of the claim of the United States of America are attached hereto and made a part of this Stipulation.

GENERAL ENGINEERING AND
MANUFACTURING CO.,
By James S. McClellan, Attorney.

UNITED STATES OF AMERICA,
By Drake Watson,
United States Attorney.

WM. V. O'DONNELL,
Assistant United States Attorney.

Dated this 18 day of May, 1950. WVO/ceb

[fol. 21] (Stipulation and Agreement as to Matters Upon which Petition for Review was submitted to Referee in Bankruptcy.)

(Filed June 19, 1950)

General Engineering and Manufacturing Company, a corporation, debtor in the above-entitled matter, and the United States of America, by their respective attorneys, hereby agree and stipulate that the Petition for Review dated May 18, 1950, may be submitted to the Honorable Rubey M. Hulen, Judge of the District Court of the Eastern District of Missouri, upon the filing of briefs by the respective counsels of General Engineering and Manufacturing Company and the United States of America, the latter to file brief within ten days after this date and the former within ten days thereafter, and the latter to be permitted to file reply brief in five days upon receipt of the answering brief of General Engineering and Manufacturing Company.

The Petition for Review is submitted not only on said briefs, but also on the following records, to-wit:—

1. Petition for Review dated May 18, 1950, stating that the Referee erred with respect to an order marked Exhibit A and made a part of said Petition for Review, in disallowing interest on $25,156.77 earned subsequent to November 16, 1948, the date when petition was filed herein.

[fol. 22] 2. The Order of Honorable Wm. O'Herin, Referee in Bankruptcy, dated May 9, 1950, marked Exhibit "A".

3. Stipulation in connection with claimant's Petition for Review.

4. Memorandum of Referee O'Herin dated May 9, 1950.

5. Amended Claim filed by collector.

6. Acknowledgment of service of copy of Petition for Review.

All of the foregoing papers have been filed and attached to the Petition for Review.

GENERAL ENGINEERING & MFG. CO.,
By James S. McClellan,
Attorney for Debtor.
UNITED STATES OF AMERICA,
By Drake Watson,
United States Attorney
Wm. V. O'Donnell,
Assistant United States Attorney.

[fol. 23] (Memorandum Opinion and Order of District Court Confirming Order of Referee in Bankruptcy Disallowing Post Interest on Government Claim, June 28, 1950.)

(Filed June 28, 1950.)

In The United States District Court, Eastern District of Missouri, Eastern Division.

In the Matter of

General Engineering And Manufacturing Company, a Corporation, Debtor.

Hulen, Judge.

In Proceedings for an Arrangement under Chapter XI.

No. 11,319.

The question presented on this appeal is the correctness of the Referee's order denying post bankruptcy interest on

the claim of the United States for Social Security, withholding and unemployment taxes. The debtor filed petition for an arrangement under Chapter XI of the Bankruptcy Act. The claim of the United States with interest to date of filing of the petition was allowed. The Referee disallowed interest on the tax subsequent to the filing of the petition and it is from this ruling that the appeal is taken. We conclude the ruling of the Supreme Court in New York vs. Saper, 336 U. S. 328, is decisive on the question presented and binding on this Court. In the Saper case the Supreme Court denied post interest on tax claims, observing:

"Every logical implication from relevant provisions is to the contrary. Section 63(a)(1), 11 U. S. C. § 103(a)(1) allows interest on judgments and written instruments only to date of bankruptcy. Section 63(a)(5), 11 U. S. C. § 103(a)(5) allows interest only to that date on debts reduced to judgment after bankruptcy. No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57 (j), 11 U. S. C. § 93(j), forbidding allowance of governmental penalties or forfeitures, permits allowance of losses sustained by the acts penalized, with actual costs and 'such interest as may have accrued thereon according to law.' However, on its face this appears to delimit even such allowable debts as of the [fol. 24] date of bankruptcy and to allow no more interest than does § 63 with respect to the claims there specified. Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' [cust] off as of bankruptcy. Section 57(n), 11 U. S. C. § 93(n) requires governmental claims to be proved in the same manner and within the same time as other debts and only for cause shown may a reasonable extension be granted. Tax claims are treated the same as other debts except for the fourth priority of payment, § 64(a), 11 U. S. C. § 104(a), and the provision making taxes nondischargeable, § 17, 11 U. S. C. § 35. But each of these sections is silent as to interest.

"The long-standing rule against post-bankruptcy interest thus appears implicit in our current Bankruptcy Act."

We are urged to disregard the Saper case on the ground it "is limited to a straight bankruptcy proceeding", that

Order.

Findings of fact and conclusions of law of the Honorable Wm. O'Herin, Referee in Bankruptcy, are adopted as the findings of fact and conclusions of law of this Court, and the order of the Referee disallowing post interest on the Government claim is confirmed.

RUBEY M. HULEN,
Judge.

[fol. 26] Notice of Appeal to the United States Court of Appeals.

(Filed July 27, 1950)

In The United States District Court, Eastern District of Missouri, Eastern Division.

In the Matter of

General Engineering and Manufacturing Company, a Corporation, Debtor.

In Proceedings for an Arrangement under Chapter XI.

No. 11,319.

Notice is hereby given that the United States hereby appeals to the United States Court of Appeals for the Eighth Circuit, from the final order of the United States District Court affirming the order of the Referee-in-Bankruptcy disallowing the interest on the claims of the United States, entered in this action on June 28, 1950.

DRAKE WATSON,
United States Attorney.

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* * * * * * *

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Mr. Drake Watson and Mr. Wm. V. O'Donnell as Counsel for Appellant.)

United States Court of Appeals for the Eighth Circuit

No. 14212.

UNITED STATES, *Appellant*,

v.

GENERAL ENGINEERING AND MANUFACTURING COMPANY, a Corporation, *Debtor*.

The Clerk will enter my appearance as Counsel for the Appellant.

DRAKE WATSON,
U. S. Attorney.

WM. V. O'DONNELL,
Asst. U. S. Attorney.
Attorneys for Appellant.

(Endorsed): Filed in U. S. Court of Appeals, Sep. 8, 1950.

(Appearance of Mr. Theron Lamar Caudle and Mr. Ellis N. Slack as Counsel for Appellant.)

The Clerk will enter our appearance as Counsel for the United States.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Court of Appeals, Sep. 9, 1950.

(Appearance of Mr. Homer R. Miller as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

HOMER R. MILLER.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 12, 1951.

(Appearance of Counsel for Appellee.)

The Clerk will enter our appearance as Counsel for the Appellee.

James S. McClellan,
George C. Willson, III,
1930 Boatmen's Bank Bldg.,
St. Louis 2, Missouri.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 17, 1950.

(Order of Submission.)

Monday, March 12, 1951.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Homer R. Miller, Special Assistant to the Attorney General, for appellant, continued by Mr. George C. Willson, III, for appellee, and concluded by Mr. Homer R. Miller, Special Assistant to the Attorney General, for appellant.

Thereupon, this cause was submitted to the Court on the printed record and briefs of counsel filed herein.

DARK PAGE BLEED THRU

(Opinion.)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 14,212.

UNITED STATES, *Appellant*,

v.

GENERAL ENGINEERING AND MANUFACTURING COMPANY, a Corporation, Debtor, *Appellee*.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 11, 1951]

Mr. Homer R. Miller, Special Assistant to the Attorney General (Mr. Theron Lamar Caudle, Assistant Attorney General, Mr. Ellis N. Slack and Mr. A. F. Prescott, Special Assistants to the Attorney General, Mr. Drake Watson, United States Attorney, and Mr. William V. O'Donnell, Assistant United States Attorney, were with him on the brief) for Appellant.

Mr. George C. Willson, III, (Messrs. Willson, Cunningham & McClellan and Mr. James S. McClellan were with him on the brief) for Appellee.

Before SANBORN, WOODROUGH, and JOHNSEN, Circuit Judges.

SANBORN, Circuit Judge.

This is an arrangement proceeding initiated by the debtor (appellee) on November 17, 1948, under Chapter XI of the Bankruptcy Act as amended (30 Stat. 544 as amended by 52 Stat. 840; 11 U. S. C. A. §1 et seq.). The United States filed a claim for Social Security and withholding taxes with interest to November 17, 1948. It also claimed interest from that date until payment of the tax claim. The Referee in Bankruptcy, to whom the proceeding was referred, allowed the claim except as to interest after November 17, 1948. The United States, in the belief that its claim bore interest until paid, sought a review and reversal of the Referee's order. The District Court confirmed the order of the Referee, and this appeal followed.

The question for decision is whether, in an arrangement proceeding under Chapter XI, a tax claim bears interest after the date of the filing of the debtor's petition.

The facts are stipulated. They are stated in the opinion of the Referee as follows:

"Debtor's petition for an arrangement was filed November 17, 1948. Debtor was originally and for many years had been engaged in the manufacture of shapers (machine tools), but in recent years began the manufacture of commercial air conditioning equipment, which at the time of commencement of these proceedings was its chief business, the manufacture of shapers having been relegated to a secondary position. The plan proposed in the original petition was in the nature of an extension. However, the company's financial condition and lack of a line of products sufficient to sustain operations in the off season made continued operation of its air conditioning business impracticable, and the proposed plan was abandoned. It was apparent that the best interests of the creditors would be served if the air conditioning division of the business could be sold as a going concern rather than have an immediate liquidation of the company. In order to maintain the business, together with its distributorship system, for such sales purposes, operations were continued under Court order, during which time material inventories were processed into finished units, those remaining unsold being included in the subsequent sale of the business. A purchaser was obtained after several months of negotiations and the plan formulated which was subsequently approved by creditors and confirmed by the Court. Under this plan debtor's air conditioning division was sold to Automatic Firing Corporation, a manufacturer of heating equipment. This sale in addition to the air conditioning division included all debtor's real estate and buildings, but excluded its machinery and equipment for manufacture of shapers, which together with all other assets, including the proceeds of the sale of Automatic Firing Corporation, were transferred to a liquidating corporation, with the exception of shaper inventory not to exceed in value $135,000.00, and shaper patents, drawings, jigs, etc., which were retained by debtor. Debtor has no remaining facilities left for manufacture of shapers, but contracts with other tool manufacturing companies to so do under its patents and in the process using up the shaper inventory so retained. The stock of this liquidating corporation is held by a creditors' committee of four selected by the creditors and the assets transferred to it, are upon liquidation to be distributed upon a proportionate basis to the general unsecured creditors. This method was adopted, as part of the purchase price received from Automatic was in notes payable within four years and liquidation of certain inventories over a period of time involved. From the proceeds of sale of the real estate there was deposited in Court $204,000.00 for payment in full of claims for $100.00 each or less, as provided in the plan, and pay-

ment of priority claims. The deposit is for more than the amount required. Any balance remaining is to be paid to the liquidating corporation for the benefit of general creditors. No objections to this plan were filed at any time prior to its confirmation. Having been accepted by the required creditors affected it was, upon due notice to all parties in interest, confirmed September 13, 1949."

In denying the United States interest upon its tax claim from the date of the filing of the petition to the time of payment, the Referee and the District Court relied mainly upon the decision of the Supreme Court in *City of New York* v. *Saper*, 336 U. S. 328. In that case it was held that tax claims against a bankrupt bear interest only to the date of bankruptcy and not until payment. The Government argues that the rule of the Saper case is limited to tax claims in what are called ordinary or straight bankruptcy proceedings, namely, those in which there is an adjudication in bankruptcy and the assets of the bankrupt are liquidated by a trustee for distribution to creditors. The Government contends that the rule may not be extended to tax claims against a debtor in a proceeding under Chapter XI.

We think that no implication reasonably can be drawn from the Saper case that tax claims have any different status in an arrangement proceeding under Chapter XI than they have in ordinary bankruptcies. The Supreme Court said in the Saper case (pages 337-338 of 336 U. S.):

"The Court of Appeals concluded that by the 1926 amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§64(a) and 57(n). Considered in conjunction with the general rule against post-bankruptcy interest as well as §63's limitations of interest on other claims to date of bankruptcy, they compel our conclusion, already stated, that the statute as amended did not contemplate any exception in favor of tax claims."

It seems apparent that if the amended sections referred to by the Supreme Court, namely 64(a), 57(n) and 63, are applicable to arrangement proceedings under Chapter XI, there can be no logical basis for a ruling that in such a proceeding a tax claim bears interest beyond the date when the debtor's petition is filed.

Section 64(a), 11 U. S. C. A. §104(a), specifies the debts which have priority in bankruptcy and makes tax claims fourth in priority of payment. Section 57(n), 11 U. S. C. A. §93(n), provides that "Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section." Section 63(a) (1), 11 U. S. C. A.

§103(a) (1), allows interest on judgments and written instruments only to date of bankruptcy. Section 63(a) (5), 11 U. S. C. A. §103(a) (5), allows interest only to that date on debts reduced to judgment after bankruptcy.

What the Bankruptcy Act gives to the United States in bankruptcy proceedings is a provable claim for its taxes and interest to the date of bankruptcy, together with a limited priority.

Section 302 of Chapter XI (11 U. S. C. A. §702) provides:

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors', and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered."

In an arrangement proceeding under Chapter XI the "debtor" is virtually a bankrupt except in name. Section 306(3), 11 U. S. C. A. §706(3). Where not inconsistent with the provisions of the chapter, the jurisdiction of the bankruptcy court over the debtor and his property is the same "as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter [Chapter XI] was filed." Section 312(2), 11 U. S. C. A. §712(2), and the powers and duties of the officers of the court and the rights, privileges and duties of the debtor are also the same as though such an adjudication had been had, Section 341, 11 U. S. C. A. §741. So also are the rights, duties and liabilities of creditors, §352, 11 U. S. C. A. §752.

The debtor, within a time fixed by the court after the acceptance of an arrangement, is required to deposit the consideration to be distributed to creditors and "the money necessary to pay all debts which have priority." Section 337(2), 11 U. S. C. A. §737(2). To determine what debts have priority, recourse concededly must be had to Section 64(a), 11 U. S. C. A. §104(a).

In case of the abandonment or rejection of an arrangement proceeding, the court may adjudicate the debtor a bankrupt or dismiss the proceeding. Section 376, 11 U. S. C. A. §776. If the court directs that bankruptcy be proceeded with, "the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had

been filed and a decree of adjudication had been entered on the day when the petition under this chapter [Chapter XI] was filed." Section 378(2), 11 U. S. C. A. §778(2). Confirmation of an arrangement effects a discharge of the debtor from all his unsecured debts and liabilities provided for by the arrangement and the order confirming it. Section 371, 11 U. S. C. A. §771. See, also, Section 372, 11 U. S. C. A. §772.

It seems obvious to us that all of the sections of the Bankruptcy Act upon which the Supreme Court relied in the Saper case in demonstrating that tax claims in bankruptcy proceedings are debts and that interest upon them is allowable only to the date of bankruptcy are equally applicable to proceedings for an arrangement under Chapter XI. We agree with the Referee in Bankruptcy and the District Court that the Government in the instant proceeding was no more entitled to the allowance of interest on its tax claim after November 17, 1948, than it would have been had the debtor on that day been adjudicated a bankrupt.

The order appealed from is affirmed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

United States Court of Appeals for the Eighth Circuit

No. 14212.

United States, *Appellant*,

v.

General Engineering and Manufacturing Company, a Corporation, *Debtor*,

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this case be, and the same is hereby, affirmed.

April 11, 1951.

(Clerk's Certificate.)

United States Court of Appeals for the Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the printed record on which the appeal from the United States District Court for the Eastern District of Missouri was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein the United States was appellant and General Engineering and Manufacturing Company, a Corporation, Debtor, was Appellee, No. 14212.

I do further certify that on the 27th day of April, A. D. 1951, a mandate was issued out of said Court of Appeals in said cause, directed to the Judges of the United States District Court for the Eastern District of Missouri.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 9th day of August, A. D. 1951.

(SEAL)

(Signed) E. E. Koch,
Clerk of the United States Court of Appeals for the Eighth Circuit.

DARK PAGE BLEED THRU

In the Supreme Court of the United States

No. ——, October Term, 1951

United States, petitioner, *v.* General Engineering and Manufacturing Company

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ORDER

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 8th, 1951.

(Sgd.) Fred M. Vinson,
Chief Justice of the United States.

Dated this 3rd day of July, 1951.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 300

Order allowing certiorari

(Filed November 5, 1951)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

978346—51

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FILED

SEP 4 1951

No. 300

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

GENERAL ENGINEERING AND MANUFACTURING COMPANY, A CORPORATION, DEBTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 300

UNITED STATES OF AMERICA, PETITIONER

v.

GENERAL ENGINEERING AND MANUFACTURING COMPANY, A CORPORATION, DEBTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on April 11, 1951.

OPINIONS BELOW

The memorandum opinions of the referee in bankruptcy (R. 8–14) and of the District Court (R. 19–22) are unreported. The opinion of the Court of Appeals (R. 25–29) is reported in 188 F. 2d 80.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1951. (R. 29.) By order

of Chief Justice Vinson, dated July 3, 1951, the time within which a petition for a writ of certiorari might be filed was extended to and including September 8, 1951. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in an arrangement proceeding under Chapter XI of the Bankruptcy Act, the United States is entitled to interest on unpaid taxes for the period following the date of the filing of the petition for arrangement.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 11–20.

STATEMENT

There is no dispute as to the facts (R. 17–18) which may be summarized as follows:

The debtor's petition for an arrangement was filed November 17, 1948. The debtor is a corporation which for many years has been engaged in the manufacture of shapers (machine tools) and more recently commercial air conditioning equipment. The plan proposed in the original petition was in the nature of an extension, but this was abandoned. It was apparent that the best interests of the creditors would be served if the air conditioning division of the business could be sold as a going concern rather

than have an immediate liquidation of the company. In order to maintain the business, together with its distributorship system, for such sales purpose, operations were continued under court order. A purchaser for the air conditioning division was obtained after several months of negotiations and a plan formulated which was subsequently approved by creditors and confirmed by the court. Under this plan, the debtor's air conditioning division was sold to a manufacturer of heating equipment, the sale including all of the debtor's real estate and buildings. From the proceeds of sale of the real estate, there was deposited in court $204,000 for the payment in full of claims of $100 or less, and the payment of priority claims. The deposit was more than the amount required, and the balance is to be paid to a liquidating corporation for the benefit of general creditors.

The remaining proceeds of the sale, together with the debtor's machinery and equipment for manufacture of shapers and certain other assets, were transferred to the liquidating corporation, the stock of which is held by a creditors' committee. Its assets are, upon liquidation, to be distributed upon a proportionate basis to the general unsecured creditors. This method was adopted since part of the purchase price was in notes payable over four years and because liquidation of certain inventories would require a period of time. Certain shaper inventory, not to exceed in value

$135,000, and shaper patents, drawings, jigs, etc., were retained by the debtor.

No objections to this plan were filed at any time prior to its confirmation. Having been accepted by the required creditors affected, it was confirmed on September 13, 1949.

The United States, on February 23, 1949, filed an amended claim for social security and withholding taxes. (R. 8.) By agreement of the parties, to eliminate certain objections made by the debtor, a second amended claim for these taxes was filed on April 7, 1950 (R. 8). The taxes, with accrued interest to November 17, 1948, the filing date of the arrangement petition, aggregated $25,156.27 (R. 4). In addition, the claim asserted interest from the date of the petition to the date of payment. (R. 4.) After hearing, the referee allowed the claim for taxes and accrued interest through November 16, 1948, but sustained the debtor's objections to interest for the period beginning November 17, 1948. (R. 7.) The District Court confirmed the order of the referee (R. 22), and, on appeal by the United States, the court below affirmed (R. 25–29).

REASONS FOR GRANTING THE WRIT

1. The Internal Revenue Code provides that if taxes are not paid when due, there shall be added as part of the tax interest at the rate of six percent until the tax is paid. Internal Rev-

enue Code, Section 1420, 1605 and 1627, set forth in Appendix, *infra*, pp. 11–12. In this case, the court below refused to permit payment of any part of the statutory interest which accrued subsequent to the date of the filing of a petition for arrangement under Chapter XI of the Bankruptcy Act (c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938 (Chandler Act), c. 575, 52 Stat. 840, Section 1). The court's decision was squarely based on this Court's opinion in *New York* v. *Saper*, 336 U. S. 328, which denied the Government the right to interest accruing during the course of a straight bankruptcy proceeding. The question here is whether this same limitation should apply in a Chapter XI proceeding.

As is pointed out in the petition for a writ of certiorari in *United States* v. *Edens*, which is being filed concurrently with this petition, these two cases, and *United States* v. *Bloom*, No. 100, this Term, present different facets of the same general problem, the *Edens* case involving Chapter X and the Bloom case state assignment proceedings for the benefit of creditors. Issuance of writs of certiorari in all three cases is sought for the reasons stated more at length in the petition in the *Edens* case.

2. The issue with respect to Chapter XI alone is an important one both in its application to the tax laws and to the adjustment proceedings of the Bankruptcy Act. Based upon a survey, made in

August, 1951, of the records in his office, the Chief Counsel of the Bureau of Internal Revenue has stated that there are currently pending approximately 771 arrangement proceedings involving federal tax claims under Chapter XI, and that the post-petition interest to August 31, 1951, exceeds $1,000,000.[1] Since not only the Government and the debtors, but also all other creditors, are directly concerned with the ultimate solution of the issue involved, this case has real importance to many persons.

3. It is the Government's view that the reliance of the court below on the decision of this Court in *New York* v. *Saper,* is misplaced for substantially the same reasons set forth in our petition in *United States* v. *Edens,* filed concurrently herewith.

Like Chapter X, Chapter XI is not an instrument for liquidating insolvent debtors and distributing their assets.[2] The primary purpose of the arrangement proceeding is rehabilitation, ap-

[1] Letter from Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, to Assistant Attorney General Caudle, dated August 20, 1951. It is also stated in this letter that both the number of proceedings and the amounts of interest involved appear to be increasing from year to year.

[2] Chapter XI is derived from Section 12 of the old Bankruptcy Act, enlarged by Section 74 added in 1933, 47 Stat. 1467. Old Section 12 was always considered as something apart from bankruptcy since its object was to revert his property to the debtor free from creditors' claims. *Cumberland Glass Co.* v. *DeWitt,* 237 U. S. 447, 453–454; *Nassau Works* v. *Brightwood Co.,* 265 U. S. 269.

plicable especially to "small individual or corporate business where there are no public or private interests involved requiring protection by the procedure and remedies afforded by Chapter X." *Securities and Exchange Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 448, 454. An arrangement proceeding is essentially a reorganization proceeding tailored to meet the needs of small business.[3]

As with Chapter X reorganizations, the condition for confirmation of an arrangement under

[3] In recommending Chapter XI, the House Committee said (H. Rep. No. 1409, 75th Cong., 1st Sess., pp. 50–51):

"The scope of the proposal has been expanded so that it may include any terms and be made upon any consideration, subject to approval by the court as fair, equitable, and in the interests of creditors. The unsecured creditors may be divided into classes, and the proposal may deal with all or any of these classes in different ways; and in such event each class votes separately. Provision is made for the rejection of contracts, executory in whole or in part, including unexpired leases of real or personal property. Debts which are incurred during the pendency of the arrangement may be given priority of payment over debts affected by the arrangement. The debtor may be continued in possession of his property during the pendency of the proceeding and also during the period of the arrangement. A general provision is inserted which permits any other appropriate terms not inconsistent with the section. In several respects the proceeding has been speeded up.

"We believe that the section as rewritten has been made sufficiently flexible to permit the offer of a settlement in a variety of situations not now covered either by section 12 or by section 74. The inclusion of corporations will permit a large number of the smaller companies such as are now seeking

Chapter XI is that the plan be "fair and equitable." Section 366 (3), (Appendix, *infra*, p. 17). This test, as in other reorganization statutes, requires absolute priority. *Mecca Temple, Etc.* v. *Darrock*, 142 F. 2d 869, 872 (C. A. 2), certiorari denied, 323 U. S. 784. And, in a reorganization procedure, a creditor's claim to interest up to the date of payment is considered one of the rights to which he has priority. *Consolidated Rock Co.* v. *Du Bois*, 312 U. S. 510, 527–530. Thus all of the essential elements which we contend make the rule in the *Saper* case inapplicable to a Chapter X proceeding, are equally compelling with respect to Chapter XI proceedings.

There are additional reasons why interest should not be cut off in this type of proceeding. It must be remembered that, under Chapter XI, no alteration may be made in the rights of the secured creditors. *Securities and Exchange Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 452. Although we are not here dealing with secured tax claims, we are dealing with a claim, which under Chapter XI, is given priority and safeguarded by the requirement that a special deposit be set up to insure its payment (Sections 337 (2), 367 (2); Appendix, *infra*, pp.

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relief under section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by section 12.

16, 18).[4] It would indeed be anomalous if interest were permitted to run on all debts not covered by the arrangement (*i. e.* secured debts), but cut off at the date of the petition with respect to federal tax claims, the payment of which is considered so important that it must be guaranteed by the establishment of a special deposit.

The adjustment which has been approved by the creditors and confirmed by the court in this very case illustrates the unreasonableness of disallowing the government's claim for interest. The plan provides, after setting up a deposit for small claims and those having priority, and after surrendering certain assets to a liquidating corporation for the benefit of creditors, that inventory not to exceed $135,000 as well as certain patents and other assets shall be retained by the debtor. Such a plan is quite within the purposes of Chapter XI, which, as is pointed out above, is intended as a means of rehabilitating the debtor. But it is not in accord with the accepted rule even in straight bankruptcy that priority creditors should be required to surrender part of their claims while the debtor is invested with a portion of his estate. Cf. *American Iron Co.* v. *Seaboard*

[4] Section 302 incorporates by reference the priorities established in Section 64a (Appendix, *infra*, p. 11) which includes taxes owing to the United States. See 8 *Collier on Bankruptcy* (14th ed. 1941) 531, 534.

Air Line, 233 U. S. 261, 266–267. As Judge Woodbury stated in his dissent in *Commonwealth of Massachusetts* v. *Thompson*, 190 F. 2d 10, 12 (C. A. 1):

> * * * in view of the fact that interest is entitled to the same priority as principal, * * * to deny interest on the Commonwealth's tax claim while permitting the debtor to continue in the ownership of its property and the control of its business would be to subordinate the right of a priority creditor to the interest of the owners of the business, in this case stockholders, and thus run directly counter to the "absolute priority" rule.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1951.

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APPENDIX

INTERNAL REVENUE CODE:

SEC. 1420. COLLECTION AND PAYMENT OF TAXES.

* * * * *

(b) *Addition to Tax in Case of Delinquency.*—If the tax is not paid when due, there shall be added as part of the tax interest (except in the case of adjustments made in accordance with the provisions of sections 1401 (c) and 1411) at the rate of 6 per centum per annum from the date the tax became due until paid.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1420.)

SEC. 1605. PAYMENT OF TAXES.

* * * * *

(b) *Addition to Tax in Case of Delinquency.*—If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 per centum per annum from the date the tax became due until paid.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1605.)

SEC. 1627 [as added by the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Sec. 2]. OTHER LAWS APPLICABLE.

All provisions of law, including penalties, applicable with respect to the tax imposed

by section 1400 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax under this subchapter.

(26 U. S. C. 1946 ed., Sec. 1627.)

BANKRUPTCY ACT, c. 541, 30 Stat. 544 [as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840, Sec. 1]:

SEC. 64. [As further amended by the Act of June 28, 1946, c. 512, 60 Stat. 323, Sec. 12]. DEBTS WHICH HAVE PRIORITY. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter pro-

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vided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this Act, the reasonable cost and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; * * *

(11 U. S. C. 1946, ed., Sec. 104.)

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CHAPTER XI—ARRANGEMENTS

* * * * *

SEC. 301. The provisions of this chapter shall apply exclusively to proceedings under this chapter.

(11 U. S. C. 1946 ed., Sec. 701.)

SEC. 302. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered.

(11 U. S. C. 1946 ed., Sec. 702.)

SEC. 306. For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

* * * * *

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(3) "debtor" shall mean a person who could become a bankrupt under section 4 of this Act and who files a petition under this chapter;

* * * * *

(5) "petition" shall mean a petition filed under this chapter by a debtor proposing an arrangement.

(11 U. S. C. 1946 ed., Sec. 706.)

SEC. 307. Unless inconsistent with the context and for the purposes of an arrangement providing for an extension of time for payment of debts in full and applicable exclusively to the debts to be extended—

(1) "creditors" shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or contingent; and

(2) "debts" or "claims" shall include all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or contingent.

(11 U. S. C. 1946 ed., Sec. 707.)

* * * * *

SEC. 323. A petition filed under this chapter shall state that the debtor is insolvent or unable to pay his debts as they mature,

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and shall set forth the provisions of the arrangement proposed by him.

(11 U. S. C. 1946 ed., Sec. 723.)

* * * * *

SEC. 337. At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—

* * * * *

(2) fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims or such deposit, or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and the money necessary to pay the costs and expenses of the proceedings and the actual and necessary expenses incurred in connection with the proceedings and the arrangement by the committee of creditors and the attorneys or agents of such committee, in such amount as the court may allow; * * *

(11 U. S. C. 1946 ed., Sec. 737.)

* * * * *

SEC. 356. An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some

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class of them, upon any terms or for any consideration.

(11 U. S. C. 1946 ed., Sec. 756.)

SEC. 357. An arrangement within the meaning of this chapter may include—

(1) provisions for treatment of unsecured debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms;

(2) provisions for the rejection of any executory contract;

(3) provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;

(4) provisions for the termination, under specified conditions, of any period of extension provided by the arrangement;

* * * * *

(11 U. S. C. 1946 ed., Sec. 757.)

SEC. 366. The court shall confirm an arrangement if satisfied that—

(1) the provisions of this chapter have been complied with;

(2) it is for the best interests of the creditors;

(3) it is fair and equitable and feasible;

(4) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and

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(5) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this Act.

(11) U. S. C. 1946 ed., Sec. 766.)

SEC. 367. Upon confirmation of an arrangement—

(1) the arrangement and its provisions shall be binding upon the debtor, upon any person issuing securities or acquiring property under the arrangement and upon all creditors of the debtor, whether or not they are affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable;

(2) the money deposited for priority debts and for the costs and expenses shall be disbursed to the persons entitled thereto;

(3) the consideration deposited, if any, shall be distributed and the rights provided by the arrangement shall inure to the creditors affected by the arrangement whose claims are not barred by the provisions of section 354 of this Act, and (a) have been proved prior to the date of confirmation and are allowed, or (b) whether or not proved, have been scheduled by the debtor as fixed liabilities, liquidated in amount, and are not disputed; and

(4) except as otherwise provided in sections 369 and 370 of this Act, the case shall be dismissed.

(11 U. S. C. 1946 ed., Sec. 767.)

* * * *

SEC. 394. The clerk and, in the case of a reference, the referee after such reference, shall forthwith transmit to the Secretary of the Treasury copies of—

(1) all petitions filed under sections 321 and 322 of this Act;

(2) all notices given in a proceeding under this chapter;

(3) all orders dismissing proceedings or directing that bankruptcy be proceeded with, discharging debtors, closing estates, and setting aside confirmations;

(4) all orders appointing receivers or continuing debtors in possession;

(5) all orders confirming arrangements, together with copies of such arrangements;

(6) all orders approving alterations or modifications in arrangements, together with copies of such alterations or modifications;

(7) all applications for allowances for compensation and expenses, and the orders making or refusing to make such allowances; and

(8) such other papers filed in the proceedings as the Secretary of the Treasury may request or which the court may direct to be transmitted to him.

Any order fixing the time for confirming an arrangement which affects claims of the United States shall include a notice to the Secretary of the Treasury of not less than fifteen days.

(11 U. S. C. 1946 ed., Sec. 794.)

* * * * *

SEC. 397. Any provision in this chapter to the contrary notwithstanding, all taxes which may be found to be owing to the United States or any State from a debtor within one year from the date of the filing of a petition under this chapter, and have not been assessed prior to the date of the confirmation of an arrangement under this chapter, and all taxes which may become owing to the United States or any State from a receiver or trustee of a debtor or from a debtor in possession, shall be assessed against, may be collected from, and shall be paid by the debtor or the corporation organized or made use of for effectuating an arrangement under this chapter: *Provided, however,* That the United States or any State may in writing accept the provisions of any arrangement dealing with the assumption, settlment, or payment of any such tax.

(11 U. S. C. 1946 ed., Sec. 797.)

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